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CASES

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES

MISCELLANEOUS

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, individually and in his capacity as former Commissioner of Education, State of Missouri, MISSOURI STATE BOARD OF EDUCATION, J. WARREN HEAD, DALE M. THOMPSON, MRS. TRUE DAVIS, JACK WEBSTER, ELSTON J. MELTON, W. CLIFTON BANTA, SIDNEY R. REDMOND, F. BURTON SAWYER, HARVEY B. YOUNG, JR., ELEANOR B. GRIFFITH, and ARTHUR B. MALLORY, present Commissioner of Education,

Petitioners,

vs.

ANNA BARRERA, individually and as Next Friend for JOANNA BARRERA, PATRICIA BARRERA, DIANA BARRERA, and MARIA BARRERA, minors, ODIS BROWN, individually and as Next Friend for RICHARD BROWN, a minor, BILLIE HAYES, individually and as Next Friend for ELAINE HAYES, EVELYN HAYES, GEORGE HAYES, BILLIE JOE HAYES, minors, GARRETT JONES, individually and as Next Friend for JANICE JONES, a minor, VINANCIO REA, individually and as Next Friend for ESTEBEN REA, a minor, PAUL ROJAS, individually and as Next Friend for YOLANDA ROJAS, MARIO ROJAS, KATRINA ROJAS, minors, PATRICIA WYATT, individually and as Next Friend for KEVIN WYATT, RAFAEL ZAPIEN, individually and as Next Friend for ANNA LISA ZAPIEN, REGINA ZAPIEN, HOPE ZAPIEN, RUBY ZAPIEN, minors,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 475 F.2d 1338 (1973), and is reprinted in full in the Petition for Certiorari herein at pp. A1-A38. The opinion of the District Court is unreported; it is set forth in the Petition for Certiorari herein at pp. A39-A44.

JURISDICTION

The judgment of the Court of Appeals (Petition for Certiorari, pp. A48-A49) was entered on March 16, 1973. The order of the Court of Appeals denying a timely petition for a rehearing (*ibid.*, p. A50) was entered on April 11, 1973. The order and judgment of the District Court on remand (*ibid.*, pp. A45-A47) was entered on May 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

STATUTE AND REGULATORY PROVISION INVOLVED

Title I of the Elementary and Secondary Education Act of 1965 (hereinafter, the Act), 20 U.S.C. 241e provides in pertinent part:

> "(a) A local educational agency may receive a grant under this part for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—
>
> (1) that payments under this part will be used for programs and projects (including the acquisition of

equipment, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs, * * * and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this part * * *;

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *."

Section 116.19 of the Regulations of the United States Commissioner of Education provides in part:

"(a) Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation. The special educational services shall be provided through such ar-

rangements as dual enrollment, educational radio and television, and mobile educational services and equipment. . . .

"(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools.

"(c) The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade. . . .

"(d) Any project to be carried out in public facilities and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

"(e) Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such

special services were designed and only when such services are not normally provided by the private school. The application for a project including such special services shall provide assurance that the applicant will maintain administrative direction and control over those services. . . . Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities." 45 C.F.R. §116.19 (1972).

QUESTIONS PRESENTED

1. Does the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241(e)(2), require that, notwithstanding contrary State law, particular educational services funded pursuant to the Act be performed in religious schools by publicly employed personnel during regular school hours if they are performed in public schools during those hours?

2. If the Act does so require, is it to that extent violative of the Establishment Clause of the First Amendment to the United States Constitution?

STATEMENT OF THE CASE

The respondents, parents of children attending religious schools, brought this class suit against the Missouri State Commissioner of Education and members of the State Board of Education, alleging that Title I services were

being arbitrarily denied to children attending nonpublic schools in Missouri. Respondents prayed for an injunction and for an accounting of some $13 million received and expended under the Act from 1966 through 1969. The District Court dismissed the complaint on the ground that the plaintiffs had failed to exhaust their administrative remedies and that the Federal court should abstain from exercising jurisdiction since the case involved the unsettled question whether Missouri law forbade assignment of Title I funded teachers to serve in religious schools during regular school hours. The decision of the District Court was held by the Court of Appeals to be erroneous, and the case was remanded for trial, *Barrera* v. *Wheeler*, 441 F.2d 795.

On the trial the defendants conceded that because of contrary State law, they had refused to approve any plan or program for use of Title I funds which involved assigning publicly employed teachers to perform their educational duties in church schools during regular school hours. They conceded also that in some school districts at some times less money was expended for Title I services actually utilized by children enrolled in church schools than for the same services utilized by children enrolled in public schools.

The defendants further argued that neither the Act nor the Regulations of the Commissioner of Education promulgated thereunder mandate the assigning of publicly employed teachers to serve in church schools during regular school hours, and to the extent that they may have authorized it they are unconstitutional under the Establishment Clause of the First Amendment.

The defense also contended that the disproportionate expenditure as between public and church schools, in the cases in which they did occur, resulted not from any malfeasance or bad faith on their part but exclusively from

the refusal of the church school authorities to participate in or cooperate with any teaching program which did not involve the assignment of teachers to serve in the church schools during regular school hours, and that when the authorities did elect to participate and cooperate in after-hour or summer programs the amounts expended for church school enrollees equalled or exceeded the amounts expended for public school enrollees.

The District Court found in the defendants' favor on both the law and the facts. On the law, the Court ruled that the Act did not mandate sending publicly employed teachers into church schools, and if it did it "would raise serious questions as to the constitutionality of Title I." On the facts, it held that "the private school pupils could undoubtedly receive an equitable proportion of the funds through after-school and summer school instruction programs, if requested by the private school authorities," that there "is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds," and that "there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in nonpublic schools." (Petition for Certiorari p. A43)[1]

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1. The District Court said:

"Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill. It is also clear that students in nonpublic schools can receive their equitable mathematical share of the funds available in after-school or summer school programs. In small school districts the furnishing of visual aids and mobile equipment could very easily furnish the equitable share of dollar aid.

(Continued on following page)

Over the dissent of Judge Stephenson, who agreed with the District Court's conclusions, the Court of Appeals reversed and remanded the case to the District Court with direction to enjoin the defendants from further violation of the Act and to retain jurisdiction for the purpose of requiring the imposition and application of guide lines comporting with Title I and regulations. (*Ibid.*, pp. A29-A30)

On remand the District Court issued an injunction and judgment (*ibid.*, p. A45) which provided in part:

> "1. Ordered and enjoined that when the needs of eligible children require it, special personnel services may be furnished under Title I by the public agency on private as well as public school premises, and further if such special personnel services are furnished public school children during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends. Defendants are enjoined from disapproving any application of a Local educational Agency (LEA) for the grant of Federal Title I ESEA Funds on the basis that such application includes the use of Title I personnel on private school premises during regular school hours."

Footnote continued—

"There is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds. Similarly, there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in the nonpublic schools." (Petition for Certiorari, p. A43)

On June 6, 1973, petitioners herein filed in the District Court a notice of appeal to the Court of Appeals from the said injunction and judgment. (*Ibid.*, p. A51)

On July 5, 1973 defendants filed a petition in this Court for a writ of certiorari to the Court of Appeals. On October 15, 1973 the Court granted the petition. On October 25, 1973 the Court of Appeals, on application of the petitioners herein suggesting mootness by reason of the granting of the petition herein, dismissed the appeal from the District Court's injunction and judgment.

PETITIONERS' STATEMENT OF FACTS AND ISSUES

The purpose of the Act is to provide Federal funds to finance programs and projects "which are designed to meet the special educational needs of educationally deprived children * * *." 20 U.S.C. 241e(a)(1). In respect to children in private elementary and secondary schools the requirement is that provision be made "for including special educational services and arrangements * * * in which such children can participate * * *." 20 U.S.C. 241e(a)(2). States are given wide discretion in determining what constitute "special educational services;" the Office of Education of the United States Department of Health, Education and Welfare (hereinafter Office of Education) states only that a "service is special if it responds to an identified, special need of the child." *Title I ESEA Participation of Private School Children: A Handbook for State and Local Officials* (1971) (hereinafter *Handbook*), p. 13. The Regulations cite as illustrative examples (*Handbook* p. 12) "therapeutic, remedial, or welfare services, broadened health servies, school breakfasts for poor children, and guidance and counseling servies." 45 C.F.R. §116.19 (c).

However, in Missouri, as in most States, it has been found that the most efficient use of the limited amount of Federal funds available under Title I of the Act is in the area of remedial instruction, primarily in reading and secondarily in arithmetic and language skills. In Kansas City, where this action was brought, the services are limited to remedial reading programs. (Court of Appeals Opinion, Pet. for Certiorari p. A9; Transcript of Proceedings in District Court, Vol. III of Appendix in Court of Appeals [hereinafter Tr.] p. 33; Extract from Application of Kansas City School District for Federal Assistance Under Title I, ESEA, Plaintiffs' Ex. 7 in District Court, Vol. III of Appendix in Court of Appeals, annexed hereto as Appendix A, *infra* p. 43) In St. Louis, the remedial programs are in reading, arithmetic and language. (Extract from Application of St. Louis Board of Education, Defendants' Ex. 3 Vol. VI of Appendix in Court of Appeals, annexed hereto as Appendix B, *infra* p. 44)

While there are, of course, some administrational personnel involved in the carrying out of Title I programs, most of the personnel are teachers and teacher aides. (Court of Appeals Opinion, Pet. for Certiorari p. A10) These are regular teachers and teacher aides who may be given additional training for remedial instruction. (Tr. p. 62; *Handbook* p. 34) The teachers and teacher aides must be publicly employed, but, in the case of private school personnel, this may mean little more than that they are paid out of Title I funds. It is permissible, for example, to employ regular private school teachers to perform educational services under a Title I project so long as "they are definitely committed to such a project as an employee of the applicant local educational agency;" it is not necessary for them to become public school employees. (*Handbook* pp. 34-35) Moreover, even where new personnel is employed, it is probable that in many cases the private school

authorities participate actively in their recruitment or approval. Thus, in a careful study of Title I programs in New Jersey conducted by Professor George R. LaNoue of Teachers College, it was found that "in at least one third of the thirty-two districts which assigned teachers to parochial schools, the public school officials conceded in interviews that parochial school authorities had either a veto power over or had actually recruited these Title I employees." (LaNoue, Church-State Problems in New Jersey: The Implementation of Title I [ESEA] in Sixty Cities, 22 Rutgers L. Rev. 219, 254 [1968])

Teacher aides paid out of Title I funds may not be used to provide general assistance to a nonpublic school teacher even if the assistance being rendered was intended to free the regular nonpublic school teacher to perform functions with respect to a proper Title I project. The reason for this is that it would constitute aid to the nonpublic school. (*Handbook* p. 36)

The equipment used in conjunction with Title I programs is purchased out of Title I funds. It may be kept on the private school premises even when not in actual use in connection with a Title I project (*Handbook* p. 13), but may not be used for other purposes. (45 C.F.R. §116.20 (a))

The materials used in Title I programs are similarly purchased out of Title I funds, but they may and usually do include materials prepared by the teacher. (See Appendix A, *infra* p. 43; L. Ringler and E. Pedhazur, An Evaluation of the Corrective Program for Disadvantaged Pupils in Non-Public Schools, New York Title I Project [1971] p. 3) While Title I funds may not be used for religious instruction or worship, there appears to be nothing in the Regulations or the *Handbook* forbidding Title I teachers to use also books and material regularly used in the private schools.

Under the Act only "educationally deprived children" may participate in Title I programs, but the criteria for determining who qualify under that standard are established by State and local educational agencies. (*Handbook*, p. 2) In Missouri, as generally elsewhere, "educationally deprived children" are defined, at least in respect to remedial instructional programs, as pupils below the established norms in the particular subject. Thus, in Missouri educational deprivation in reading is defined as "[b]elow norm on standardized tests by: 3 months—Primary; 6 months—Intermediate; 9 months—grade 7; below 40th percentile on Reading Readiness Test for Kindergarten." (App. A, *infra* p. 43) As the Court of Appeals noted, the reading retardation may result from the fact that the pupils are of Mexican-American heritage and for that reason require the "special educational services" provided for in the Act. (Pet. for Certiorari p. A15) The educationally deprived children are thus normal children who happen to be slow readers; indeed, the St. Louis Application (App. B, *infra* p. 44) notes that mentally retarded or emotionally disturbed children are not eligible.

The objective of the program, as stated in the Kansas City Application, is to "raise the achievement level in reading by six to fifteen months during eight months of instruction." (*infra* p. 43) This is achieved through the use of smaller classes (e.g., "Rooms of 15", App. B, *infra* p. 44), and somewhat more intensive instruction by regular teachers who have received some additional in-service training, and are assisted by teacher aides. (St. Louis does have a separate Title I program at Lincoln High School providing "a special instructional environment for socially maladjusted students suspended from Title I high schools because of behavior disruptive to other students' learning, poor school attendance and inadequate learning performances." [Application for Lincoln High School, annexed

hereto as Appendix C, *infra* p. 45] However, the program is similarly basically an instructional program with still smaller classes and work-study orientation. *Ibid.*)

We have set forth this statement of the facts to narrow the issues facing this Court. We do not have here any controversy regarding welfare benefits, such as medical or dental care, breakfasts and lunches, or even psychological services for maladjusted children. We are dealing only with what is basically the every-day, regular instruction given in elementary and secondary schools, somewhat intensified for the benefit of slower students. The issue before this Court is whether the Act mandates such tax-financed instruction in religious schools, and if it does whether the mandate is consistent with the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

At the very least, an interpretation of the Act to require assignment of publicly employed personnel to teach in religious schools during regular school hours raises grave constitutional questions. It is a cardinal principle of statutory construction that such an interpretation be avoided unless the challenged statute textually requires it. Nothing in the text of the Act, its legislative history or its practical construction by the Office of Education supports such an interpretation; rather all point to the contrary. Moreover, they indicate clearly that Congress had specifically in mind a possible conflict between the permissive assignment of publicly employed teachers to religious schools and contrary State law, and intended that the State should not forfeit its right to benefits under the Act by its adherence to its own law.

Should we be in error on this point and should the Court interpret the Act as requiring assignment of publicly employed personnel to teach in religious schools during regular school hours, the Act would to that extent violate the Establishment Clause of the First Amendment, as interpreted by the Court in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, 403 U.S. 602 (1971), which are indistinguishable from the present case. It would be unconstitutional because (a) it does not, nor can it effectively assure that the governmentally financed teaching will not be utilized to advance religion; (b) any efforts to prevent this will inevitably involve the government in the comprehensive, discriminating and continuing surveillance which the First Amendment forbids; (c) aside from surveillance, administration of the Act so construed necessarily involves the state in continuing and excessive entanglement in religious affairs; and (d) intensification of political divisiveness on religious lines will necessarily result.

ARGUMENT

I.

The Act does not mandate assignment of publicly employed teachers to teach in religious schools during regular school hours.

A. Avoidance of Constitutional Doubts

The threshold question in this case is whether, as held by the Court of Appeals, the Act does mandate assignment of publicly employed teachers to render educational services in religious schools during regular school hours, even where such action would violate contrary State law. In Part II of this brief we argue that such a construction of the Act would render that provision unconstitutional under the Establishment Clause of the First Amendment. Here we urge only that it would at the very least raise grave questions of constitutionality. It is a well-settled principle that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Few principles of law have been so faithfully adhered to by the Court as this one. Literally scores of cases have been decided by the Court wherein it reached a constitutional conclusion through a statutory interpretation which, as the Court has said, was "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely*, 345 U.S. 41, 47 (1953). To summarize, or even list all these cases would unduly extend the length of this brief, and hence we merely cite in the footnote a representative sample in all of which, as in the present case, a challenge of uncon-

stitutionality under the First Amendment was made to the Court.[2]

Nothing in the text of the Act, in the legislative history, or in its practical construction by the Office of Education supports the interpretation adopted by the Court of Appeals. Rather all of these point clearly and unambiguously to the directly opposite conclusion.

B. Statutory Text

We can find nothing in the text of the Act which can reasonably be construed as requiring the assignment of publicly employed personnel to teach in religious schools during regular school hours. The only relevant portion is 20 U.S.C. 241e(a)(2) which provides that a State agency shall approve a project proposed by a local agency only if it is determined.

> "that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . ."

This provision can hardly be construed as requiring assignment of personnel to serve in private schools. On

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2. *Schneider* v. *Smith*, 390 U.S. 17 (1968); *Yates* v. *United States*, 354 U.S. 298 (1957); *United States* v. *Seeger*, 380 U.S. 163 (1965); *Cole* v. *Young*, 351 U.S. 536 (1956); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *United States* v. *Rumely*, 345 U.S. 41 (1953); *Hannegan* v. *Esquire*, 327 U.S. 146 (1946); *Peters* v. *Hobby*, 349 U.S. 331 (1955); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Welsh* v. *United States*, 398 U.S. 333 (1970).

the contrary, of the five illustrations of permissible services given in it (dual enrollment, educational radio, educational television, mobile services, mobile equipment) only one, mobile services, may involve sending Title I teachers into private schools.

Even more significant, one of the illustrations, "dual enrollment," means *not* sending teachers into private schools. Under dual enrollment, as explained by the Office of Education, the "private school child, retaining membership in the private school, attends the public school for special educational services on a part-time basis." (*Handbook* p. 11) Moreover, it means not sending teachers into private schools to perform exactly the same "special educational services" which are performed in public schools during regular school hours. In the light of this express provision of the Act we confess that we find it difficult to understand the contrary interpretation of the Court of Appeals.

C. Legislative History

Nor is there anything in the legislative history of the Act that supports such an interpretation. The Reports of both the Senate and House Committees set forth a large number of programs stated to be "illustrative of the many possibilities of use of funds" supplied under the Act. (S. Rep. No. 146, 89th Cong. 1st Session, pp. 10-11; House Rep. No. 143, 89th Cong. 1st Session, pp. 6-7) Among these there are many, if not most, which do not contemplate publicly employed personnel coming on school premises to perform Federally financed services. Illustrative are "Institutes for training teachers in special skills"; "Supplementary instrumental materials"; "Pre-school training programs"; "Instrumental media centers to provide modern equipment and materials"; "Provision of clothing, shoes

and books where necessary"; "Financial assistance to needy high school pupils"; "Mobile learning centers"; "Educational summer camps"; "Arts and crafts programs during summer vacation"; "Work experience programs"; "Field trips for cultural and educational development"; "Bookmobiles—home oriented"; "Afterschool study centers"; "Pre-school pupil transportation."

The crux of the matter can be summarized by the statement in both Reports (S. Rep., p. 9; H. Rep., p. 5) that ["i]t is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts."

D. Administrative Interpretation

The United States Commissioner of Education filed a brief *amicus curiae* in the Court of Appeals urging reversal of the District Court's decision. The District Court's opinion (Pet. for Certiorari pp. A40-A41) states that "[o]mitting all the legal verbiage in this case, the basic issue is very simple. . . . The plaintiffs contend . . . that if the defendants authorize the employment of teachers in the public school during regular school hours, then Title I mandates the employment of teachers in the nonpublic schools on an equitable basis (average expenditure per pupil)."

The plaintiffs contended that it did; the defendants contended to the contrary. It was the only legal issue presented to the Court of Appeals, and it was argued extensively in the briefs of both parties and of all the *amici curiae* other than that of the Commissioner. His brief was strangely silent; it not only did not take a position on it, but did not even discuss it.

Had the Commissioner taken a position on the critical issue in the case, he could hardly have supported the plain-

tiffs' claim, for it has been the position of the Office of Education from the enactment of the statute to the present time that the Act does *not* mandate assignment of publicly employed teachers to teach in private schools during regular school hours. At the very opening of its *Handbook* the Office of Education states:

> "In brief and rather simple language, Public Law 89-10 sets forth the provision affecting private school children in Section 105(a) and Section 105(a) (2) of Title I ESEA. Basically the law requires that the local educational agency (LEA) must provide special educational services for educationally deprived children enrolled in private schools. The provision of these services must be consistent with the number of educationally deprived children in the private schools. Title I regulations emphasize this requirement. The law cites several examples of ways these services may be rendered, 'such as dual enrollment, educational radio and television, and mobile educational services and equipment.' *Nowhere is a particular method prescribed or mandated.*" (Emphasis added.)

Not long after the adoption of the Act the attention of the Commissioner of Education was called by then Missouri Senator Edward V. Long to the specific question presented in this case. The Commissioner did not respond, as did the Court of Appeals, that assignment of teachers was mandatory; on the contrary the answering letter, signed by the Assistant Commissioner of Education and dated July 3, 1967, stated:

> "This Office is well aware that certain types of arrangements involving private school children which may be legal in some States are not permitted under Missouri Law. *It should be noted, however, that Title*

I does not require that private school children be served through any particular type of arrangement. What is required by sec. 116.19 of the regulations (enclosed) is that genuine opportunities be provided for the participation in Title I services by educationally deprived children attending private schools and that such opportunities be consistent with the number of such children and the nature and extent of their deprivation." (Defendants' Ex. 7, Vol. VII Appendix in Court of Appeals. Emphasis added.)

The *Handbook* addresses itself to the same problem (pp. 19-20).

"State Constitutions and Statutes

Many State departments of education found severe restrictions with respect to the kind of services that their respective State constitutions and statutes allowed them to provide to private school students, especially when those private schools were owned and operated by religious groups.

The following list illustrates the kind of prohibitions encountered when State constitutions and laws are applied to Title I. The list is not exhaustive.

*Dual enrollment may not be allowed.

**Public school personnel may not perform services on private school premises.*

*Equipment may not be loaned for use on private school premises.

*Books may not be loaned for use on private school premises.

*Transportation may not be provided to private school students.

Sometimes such prohibitions exist singly in a given State. Often, the prohibitions exist in combination.

When ESEA was passed in 1965, each State submitted an assurance to the U. S. Office of Education in which the State department of education stated its intention to comply with Title I and its regulations, and the State attorney general declared that the State Board of Education had the authority, under State law, to perform the duties and functions of Title I as required by the Federal law and its regulations. *While State constitutions, laws, and their interpretations limit the options available to provide services to private school students,* this fact, in itself, does not relieve the State educational agency of its responsibility to approve only those Title I applications which meet the requirements set forth in the Federal law and regulations.

A number of school officials realized that they could not submit the required assurance because of the restrictions applying to private school students which were operative in their States. The impasse was successfully resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed programs.

Other States have proposed legislation which would allow the SEA to administer Title I according to the Federal requirements. *Still others have applied the restrictions of the State to Title I and have relied upon the initiative of school administrators to develop a program that would meet the Federal requirements."* (Emphasis added.)

What the petitioners herein have done, as the evidence establishes and the District Court found, was to adopt and apply the last listed of the recommendations in the *Handbook* to avoid Federal-State conflict in effectuating the objectives of the Act. But if the Court of Appeals was correct, the *Handbook* should have stated simply that State restrictions must be disregarded.

Finally, we quote the following from the *Handbook* (p. 23):

"*Logistics*

Not the least of the difficulties in including private school children in Title I activities are the problems of scheduling, transportation, hiring and assignment of personnel, purchase and inventory of equipment, and arrangements for space. In those States in which public school personnel may not perform services on private premises, the difficulties are compounded.

There are no easy solutions to the logistical problems. However, when the legal situation allows several options and good will exists between public and private school representatives, the logistical problem can be solved or reasonably reduced."

If the Court of Appeals was correct, there was a very easy solution to the logistical problems: assign the public school personnel to perform the Title I service on private premises. The fact that the Office of Education did not even suggest this solution appears quite conclusively that it did not deem it a solution permissible under the Act.

E. The Rationale of the Court of Appeals

On what then did the Court of Appeals base its decision that assignment of teachers to religious schools was mandatory under the Act. On no more than the following paragraph in a "Program Guide" issued by the Office of Education:

> "The needs of private school children in the eligible areas may require different services and activities. *Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority.* 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children." Commission of Education, Title I Program Guide No. 44, 4.5 (1968). (Emphasis ours.) [Pet. for Certiorari p. A7.]

The Court of Appeals recognized that the sentence which it emphasized is to be found neither in the Act nor in the Regulations. It states:

> This guideline is *presumably* based in part on section 116.18(a) of the regulations which reads:
>
> "(a) Each application by a State or local educational agency for a grant (other than one for a planning project) must propose projects of sufficient size, scope and quality as to give reasonable promise of substantial progress towards meeting the needs of educationally deprived children for whom the projects are intended." 45 C.F.R. §116.18(a) (1972). (*Ibid.*, pp. A7-A8. Emphasis added.)

The Court of Appeals thus leaps from the text of 20 U.S.C. 241(2)(a)(2), which speaks only of "special educational services and arrangements" in which private school "children can participate", to "size, scope and quality" in the Regulations, thence leaps again to "comparable" in the Program Guide, and finally leaps to *identical* in its own Opinion. "It is not a comparable program," says the Court of Appeals, "to provide only after hour and summer remedial instruction on neutral sites which are open to the needy private school child while offering the same services during regular school hours for deprived public school pupils * * *." (Pet. for Certiorari p. A15)

(The last leap is indeed a great one. It is quite clear that the Program Guide, in referring to "comparability" is speaking in quantitative terms, i.e., attainment "in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children.")

We concede that providing educational services to private school children on private school premises during regular school hours would be more convenient to them than providing the services after school hours. But it is no less true that requiring private school children to travel what may be a long distance to a public school during school hours to receive Title I services may be considerably more inconvenient to them. As the Office of Education notes in speaking of dual enrollment: "Even when the private school is located very close to the public school, there are difficulties in scheduling, space, safety, etc. As distance increases, additional problems of transportation and loss of instructional time are likely to arise." (*Handbook* p. 11)

The Act, in referring to dual enrollment as a permissible means of fulfilling Title I requirements in respect to private school children, did not limit permissibility to dual enrollment programs but, using the term "such as", indicated that dual enrollment programs were merely an example of permissibility. If the inconvenience of dual enrollment does not render such programs noncomparable and hence impermissible, we cannot see how after hours services can be so held.

Our conclusion from the language of the Act, its legislative history and its interpretation and application by the Office of Education is that comparable does not mean identical. We submit that Congress recognized that respect to State laws in effectuating the purposes of the Act might in some cases result in services to private school children which are less convenient than those accorded to public school children, but that Congress felt that this was a necessary and justifiable price for maintaining our traditional standards of federalism, particularly in the field of education.[3]

We submit, therefore, that the Court of Appeals was in error in interpreting the Act as requiring Title I teachers to serve within private schools during regular school hours if the State assigns them to serve in public schools during those hours.

---

3. 20 U.S.C.A. §1232a reads as follows: "No provision of the Act of September 30, 1950, Public Law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Eighty-first Congress; the Higher Educational Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; the Emergency Schools Aid Act; or the Vocational Educational Act of 1963 shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system. . ."

II.

Assignment of publicly employed personnel to teach in religious schools during regular school hours violates the Establishment Clause of the First Amendment.

A. The Indistinguishability of Lemon-DiCenso

In *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, as well as in its *per curiam* affirmance in *Sanders* v. *Johnson*, 403 U.S. 955 (1971), the Court held unconstitutionally violative of the Establishment Clause differing methods of tax-financing of secular instruction in religious schools. We submit that insofar as the basic constitutional issues are involved these cases are indistinguishable from the present one.

We noted in our Statement of Facts and Issues (*supra*, p. 9) that the Title I financed services at issue in this case are basically every-day regular instruction in subjects such as reading and arithmetic, the same subjects taught in the private schools in the *Lemon-DiCenso-Johnson* cases. (The Pennsylvania statute in *Lemon* limited the program to mathematics, modern foreign languages, physical science and physical education. 403 U.S. at 610.) The only difference between those cases and the present one is that in the former the teachers remained employees of the school whereas in our case they are technically employees of the local educational agency.

The difference, we suggest, is far narrower than appears at first sight and does not reach the constitutional level. In the first place, as we have noted (*supra*, p. 10), under the Act as interpreted and applied by the Office of Education, it is permissible to employ regular private school teachers to perform educational services under Title

I projects so long as "they are definitely committed to such a project as an employee of the applicant local educational agency." There is not much difference between this and the Rhode Island statute in *DiCenso* under which the private school teacher had to first agree in writing "not to teach a course in religion so long as or during such time as he or she receives any salary supplements" from the State. (403 U.S. at 608) Secondly, as the LaNoue study shows (*supra*, p. 11), even where new non-private school personnel are employed, they are often recruited by the private school authorities, and in such circumstances it is more than probable that they will look to the private school authorities as their *de facto* employers. This conclusion is fortified by the fact that in many cases the Title I teachers are assigned to work full time at particular nonpublic schools. (LaNoue, 22 Rutgers L. Rev. at 253; Board of Education of the City of New York, "Guidelines for Supervision of Board of Education Personnel in Non-Public Schools, ESEA Title I Programs," Defendants' Ex. 8, Vol. VII, Appendix in Court of Appeals.)

Finally, and most important, the factors which impelled the holdings in *Lemon-DiCenso-Johnson* and in the succeeding cases of *Levitt* v. *Committee for Public Education and Religious Liberty*, 93 S. Ct. 2814 (1973), *Committee for Public Education and Religious Liberty* v. *Nyquist*, 93 S. Ct. 2955 (1973) and *Sloan* v. *Lemon*, 93 S. Ct. 2982 (1973), are no less present in the instant case. The remainder of this brief will be devoted to an examination of these factors. Here, we note only that in the case of *Americans United For Separation of Church and State* v. *Oakey*, 339 F. Supp. 545 (1972), the court, in invalidating a State statute providing for the assignment of public school teachers to serve in private schools, reached the same conclusion. Speaking for the court, Circuit Judge Waterman said:

"It is contended that because all the hiring of instructors and all the buying of teaching materials for the statutorily specified secular subjects is arranged for by the local school districts, there will be but little entanglement between church and state. The actual mechanics of this intrusion by the employees of the school districts into the sectarian schools is not spelled out in the statute. Presumably, the implementation of the plan is left to the school districts themselves. The potential, however, for involvement of the state, through the school districts, in religious affairs is not dispelled by its lack of articulation.

On its face the statute will create within the established hierarchy of parochial school administration a unit of teachers whose loyalties do not run to the school's administration but rather to the superintendent of the school district. The Court pointed out in *Lemon, supra*, at 2113, that, 'Religious authority necessarily pervades the [parochial] school system[s].' Through the state control of teachers in the church schools, government control would become entangled with the existing religious control, and the day-to-day instructional administration would of necessity be the result of close cooperation between the school's administration and the public school district's administration."

Other cases are in accord. *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (1973); *Klinger* v. *Howlett*, ... Ill. ..... (1973); *State ex rel. Chambers* v. *School District No. 10*, 155 Mont. 422, 472 P.2d 1013 (1970); *State ex rel. Public School District* v. *Taylor*, 122 Neb. 454, 240 N.W. 573 (1932).

B. The Purpose-Effect-Entanglement Tests

In *Board of Education* v. *Allen*, 392 U.S. 236 (1968) the Court held that under the Establishment Clause governmental action may not have either as a purpose or as a primary effect the advancement of religion. In *Lemon-DiCenso* it added as a third element that the action must also not involve excessive governmental entanglement with religion. That decision and its successors indicated that the forbidden entanglement may take the form of (a) surveillance to assure compliance with First Amendment, statutory or administrative prohibitions against use of governmentally financed property or services to advance religion, (b) entanglement in the administration of the governmentally financed project, and (c) political divisiveness on religious lines.

We do not contest the secularity in purpose of the challenged provision of the Act. (20 U.S.C. 241e(a)(2)) We do, however, contend strongly that it cannot pass muster under any of the other elements of the test, specifically, the advancement of religion, surveillance, administrative entanglement, and political-religious divisiveness aspects.

C. Advancement of Religion

In *Nyquist* and *Sloan* the Court made it clear that a law with *a* primary effect that advances religion violates the Establishment Clause and that it is not necessary to establish that this is *the* or only primary effect. Thus, the fact that in these cases the tuition grants covered only a portion of the parochial school costs, not more than the amount of tuition applicable to the secular aspects of the curriculum, was held not to immunize the statutes from constitutional challenge. (93 S. Ct. at 2972-73)

Moreover, and most important, it is not sufficient to escape invalidation under the Establishment Clause that a particular program may be conducted in such a way as not to advance religion. It is indispensible that the statute itself, or at least the statute taken together with regulations promulgated pursuant thereto, prescribes safeguards adequate to assure that the advancement of religion will not result from its administration. In *Nyquist*, the Court struck down a statute that appropriated public funds to be used for "maintenance and repair" of nonpublic schools in poverty areas, to ensure the pupils' "health, welfare and safety." The statute provided that the per-pupil grants were not to exceed 50% of the average per-pupil cost for equivalent services in the public schools, on the assumption that at least that percentage of the private schools' operations would be devoted to secular instruction. The Court said:

> "* * * Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In *Earley* v. *DiCenso*, the companion case to *Lemon* v. *Kurtzman*, *supra*, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating 'their religious beliefs from their secular educational responsibilities.' 403 U.S., at 619.
>
> 'The Rhode Island Legislature has not, *and could not*, provide state aid on the basis of a mere assump-

tion that secular teachers under religious discipline can avoid conflicts. The State *must be certain, given the Religion Clauses,* that subsidized teachers do not inculcate religion * * *' *Ibid.* (Emphasis supplied.)

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting the state grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny * * *." (93 S. Ct. at pp. 2968-69.)

By the emphasis which it supplied to the quotation from the *DiCenso* opinion the *Nyquist* Court showed as clearly as it could that the key to satisfying the non-advancement of religion requirement is not possibility nor probability but certainty. The same principle was the basis for the invalidation in *Levitt* of another New York statute appropriating funds to reimburse nonpublic schools for expenses incurred in conducting State mandated tests and examinations. The Court said:

"The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in *Nyquist.* As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of testing in the total teaching process, *no attempt*

is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' *Lemon* v. *Kurtzman*, supra, 403 U.S., at 618. *But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.* See *Lemon* v. *Kurtzman, supra*, 403 U.S., at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separate from aid to sectarian activities." (93 S. Ct. at pp. 2818-19. Emphasis added.)

How, in the present case, does the Government or the State agency make "certain, given the Religion Clauses, that subsidized teachers do not inculcate religion"? How can they assure themselves "that the state-supported activity is not used for religious indoctrination?" How can it be certain that Title I equipment will not be used for religious instruction, or that teacher aides will not assist regular religious school teachers in the latters' performance of their duties, or that the Title I teachers themselves will not do so? Statements in the Program Guide (p. 14)

that "[n]o Title I funds may be used for religious worship or instruction" are hardly adequate; similar prohibitions were contained in the Pennsylvania and Rhode Island statutes invalidated in *Lemon-DiCenso*.

Nor can much reliance be placed on the fact that the Title I teachers are technically on the payroll of the local educational agency rather than the school, in view of the fact that they are often recruited by the private school authorities and are assigned to the schools for full time services. As LaNoue noted, "[w]hen a parochial school recruits a teacher and controls her reappointment, it is only a legal technicality that the Board of Education writes her checks." (22 Rutgers L. Rev. at 255) In New York, for example, it was found that considerable pressure was exerted by private school principals for an arrangement whereby the Title I reading teachers would work "in the classroom with regular parochial teachers" so that they would become an "integral part of the school's program." (Ringler and Pedhazur, *supra*, at p. 27)

In *Allen*, the Court upheld the constitutionality of a statute providing for the loan of public school textbooks for use by pupils in nonpublic schools. In the present case, however, much of the material used is teacher-prepared (see *supra* p. 11), so that the situation is closer to that in *Levitt* than in *Allen*. Moreover, the cost of materials represents but a small part of the budget as compared to teachers' salaries (Pet. for Certiorari p. A10), and there is a vast difference between textbooks and teachers' services. As was said in *Lemon*:

> "In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that

teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation." (403 U.S. at 617)

In sum, 20 U.S.C. 241e(a)(2) as construed by the Court of Appeals cannot stand because neither it nor the Regulations or other directives, Handbooks or Program Guides issued by the Office of Education assure that Title I services, materials and equipment will not be used for religious instruction or religiously-oriented secular instruction or otherwise to advance religion.

D. Entangling Surveillance

"We * * * recognize," the *Lemon* Court said in language particularly appropriate to the present case, "that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals." (403 U.S. at 619)

How can a State make sure, as it must, that a Title I teacher assigned to serve in a religious school will remain "religiously neutral?" One way perhaps would be not to assign "a dedicated religious person" to teach "in a school affiliated with his or her faith and operated to inculcate its tenets." This, obviously, would be unlawful; it would violate Article VI of the Federal Constitution forbidding

religious tests for public office; it would violate the Establishment and Free Exercise Clauses as interpreted by the Court in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); it would violate the Equal Protection Clause of the Fourteenth Amendment; and it would violate Title VII of the Civil Rights Act of 1964.

Writing restrictions into the statute, regulations and guidelines will, as we have noted, simply not do. "Unlike a book," said the Court in *Lemon* (*ibid.*), "a teacher cannot be inspected once so as to determine the extent and intent of his or her personal tenets and subjective acceptance of the limitations imposed by the First Amendment." There is only one way the State can make sure and that is the one given by the Court in *Lemon* (*ibid.*): "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." But that is the way which the *Lemon* Court held is barred by the same First Amendment, for, of course, it means excessive entanglement by the state in the affairs of the church.

It is no answer to say that the same surveillance might be required if the "dedicated religious-person" paid with Title I funds taught in a public school. Aside from the fact that occasions and pressures to inculcate religious values in his or her teaching would be far less, is the more important point that even if this were not so, the Establishment Clause forbids entanglement of the state with religious institutions; it does not forbid entanglement with its own institutions. It is constitutional for the state to maintain surveillance and control over what goes on in public schools and what the teachers do there; it is not constitutional for it to maintain surveillance and control over what goes on in religious schools.

Allen allowed use in parochial schools of textbooks approved for public school use, but, as we have noted, nothing in the Regulations or other directions issued by the Office of Education forbids Title I teachers from using the private schools' regular textbooks in conjunction with their teaching; both the opportunity and the temptation to do so would ever be present. The constitutional infirmity lies not in the failure of the state to prohibit it, but rather in the constant and continuing surveillance necessary to make the prohibition meaningful. The same is true of the use of Title I teacher aides to assist regular teachers when they are not busy with their Title I activities. The Program Guide forbids this, but enforcement would require continuing on the spot policing; periodic written reports to the local educational agency would hardly suffice.

In *Public Funds for Public Schools* v. *Marburger*, *supra*, the District Court for the District of New Jersey held unconstitutional a State law similar to and patterned after the provisions of the Act at issue in this suit. What the District Court said in that case is no less applicable here:

> "The defendants argue that no surveillance would be required to enforce State limitations in the auxiliary program because the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic. Even though this argument is sound, to a degree, a teacher who teaches reading or remedial reading remains a teacher. A teacher's instruction may vary in content or emphasis and is not entirely predictable. A teacher is not a textbook, the contents of which remain constant, as the Court recognized in *Lemon*, stating:

'We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.' *Lemon, supra,* at 617.

"This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and non-ideological subject matter.

Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers. Furthermore, the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints." See *Lemon* v. *Kurtzman, supra,* at 619.

E. Administrative Entanglements

In *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970), the Court warned against "governmental grant programs [which] could encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards." For that reason in *Lemon-Di-Censo*, it ruled unconstitutional the Pennsylvania and Rhode Island statutes financing secular teachings in church schools. In the present case, completely aside from the question of surveillance, we cannot see how publicly employed personnel can be assigned to render educational services in religious schools without involving both church and state in sustained administrative relationships. A religious school does not cease to be a religious school when a public school teacher walks in. It remains under the control and direction of the religious authorities and the public school teacher must work out his or her operational relations with them on a continuing and day-to-day basis.

In New York it was found that Title I corrective reading teachers were supervised both by the Title I field supervisors and the principals of the private schools in which they worked. (D. Hitteman, Final Report of an Evaluation of the Corrective Reading Service in Non-Public Schools, July 1972, p. 13.) This is undoubtedly the case in most private schools to which Title I teachers are assigned; indeed, it is difficult to see how it could be otherwise. The New York studies showed further that it was common for the private school principals and other administrative officials to urge greater administrative roles for themselves and more involvement of the Title I teachers in the regular classroom work and with the regular classroom teachers. (J. Justman, An Evaluation of Non-Public School Participation in District Decentralized ESEA Title I Programs, 1970-1971 School Year p. 4.) This, too, must be a common situation.

It really does not matter whether the Title I teacher is subject to the direction and control of his or her supervisor or of the religious school principal or both. The crux of the matter is that there are and must be continuing administrative relationships between church and state, and these bring with them the conflicts and confrontations which the Establishment Clause seeks to prevent. Suppose, for example, that the practice in the religious school is to start or conclude each session with a prayer. What is the teacher's role in these circumstances? Or suppose, as is usually the case, male teachers in Jewish religious schools must keep their heads covered at all times. The public school teacher who comes in is accustomed to teach without wearing his hat. What is he to do? What happens when the school observes a holy day? In New York City, where Title I teachers do serve in religious schools, the Board of Education issued "Guidelines for Supervision of Board of Education Personnel in Nonpublic Schools" (Defendants' Ex. 8, Appendix in Court of Appeals), which seek to meet this and similar problems. They provide (at pp. 3-4) that "On such days, it may be possible for the nonpublic school principal (if the building can remain open) to permit the Title I teacher to work in the school on certain nonteaching assignments." Does this not require "sustained administrative relationships?"

Paragraph 6 of the "Guidelines" is entitled "Nonpublic School Staff Involvement and Communications." It reads in part:

> "The principal of the nonpublic school confers with the Title I teachers regarding matters of mutual concern and interest (including facilities, schedules, school regulations and routines, pupil progress, needs and problems), and visits groups for such purposes as obtaining information, and observing the nature and quality of the program.

> Frequent communication between the Title I teacher and the classroom teachers is desirable. Matters of mutual interest and concern may include: teacher-pupil relationships, pupil home conditions, pupil progress, needs and problems, class and group work and materials, articulation of their efforts, storage facilities, and utilization of available space."

If this is not sustained administrative relationships and entanglement, we cannot imagine what would be.

The LaNoue study of the New Jersey schools is similarly replete with instances of close and continuing operational relationships between Title I teachers and church school authorities and the problems and conflicts these relationships give rise to. The Office of Education recognizes that these relationships are necessary and inevitable when Title I personnel are assigned to teach in religious schools. The *Handbook* presents many examples, of which the following (from p. 9) is but one:

> "Ultimately, the public school agency has legal responsibility to determine the needs of, gather data on, and evaluate the progress of the private school children in Title I activities. These tasks are included among those for which monies may be expended by the LEA. Private school officials and personnel are expected to cooperate with the public school agency in the execution of these tasks."

Religious schools are established and operate in order to inculcate religious values and further the purposes of the sponsoring church. Can it be assumed that in participating in the evaluation of Title I projects the religious school authorities will be completely uninfluenced by the extent to which the operation of the projects and the performance of Title I teachers helped further the school's religious objectives? Two centuries ago, Jefferson in his

great Virginia Statute for Establishing Religious Freedom (12 Henning, Virginia Statutes, 85) noted the danger that the civil magistrate who intrudes his power in the field of opinion "will make his opinion the rule of judgment and approve or condemn the sentiments of others only as they shall share or differ from his own * * *." Is it likely that religious authorities who intrude their powers in the secular field will do less?

In *Walz*, the Court refused to justify tax exemption of churches on the basis of the "good works" they perform since to "give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." (397 U.S. at 674) The instant case presents the converse: it deals with the introduction of religious evaluation and standards as to the worth of particular social welfare programs. The result is the same in both cases—that continuing day-to-day relationship between church and state which the Establishment Clause forbids.

F. Political-Religious Divisiveness

In 1969 Professor Paul Freund remarked sagely that while ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. (Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 [1969].) The truth of that observation was reflected in *Lemon* (403 U.S. at 622-626) and *Nyquist* (91 S. Ct. at 2976-78). We need not repeat

here what was said in those cases. We suggest only that they are no less applicable to the controversy now before this Court and present an additional reason for a determination that assignment of publicly employed personnel to teach in religious schools violates the Establishment Clause of the First Amendment.

CONCLUSION

For the reasons herein set forth the judgment of the Court of Appeals should be reversed and that of the District Court be reinstated.

Respectfully submitted,

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APPENDIX A

... THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI

APPENDIX A

...y Description

...ation of activity (school facilities to be used) READING-ELEMENTARY DEVELOPMENTAL

Attucks, Douglass, Faxon, Franklin, Garrison, Karnes, Phillips, Switzer, Parkington, Woodland, and Yates

...ber of hours per week children will participate in this activity

...	...	...	...	...
2-5 hrs.				

...cribe briefly how eligible children (public, non-public, institution, out of school) will participate in this ...ivity. (Include length of instructional period, average size of classes, number of periods per week, and ...thods of instruction used.)

A reading specialist will assist classroom teachers in daily developmental reading instruction and provide corrective or remedial reading instruction in groups of four to ten on a regularly scheduled basis. Programmed reading texts plus a variety of supplementary materials combined with pupils' creative writing and teacher-made materials will be utilized to extend and strengthen reading skills.

On the job training in developmental reading skills will be provided for the teachers.

...gree of educational deprivation necessary for participation

Below norm on standardized tests by: 3 months--Primary; 6 months--Intermediate; 9 months--grade 7; below 40th percentile on Reading Readiness Test for Kindergarten

...ectives To raise the achievement level in reading by six to fifteen months during eight months of instruction.

...thods of Evaluation Standardized tests, pupil goal setting, progress records, teacher observation, checklist, mastery tests

APPENDIX B

APPENDIX B

Activity Description

Location of activity (school facilities to be used)

See attached.

Number of hours per week children will participate in this activity

PUBLIC SCHOOL	NON-PUBLIC SCHOOL	NOT ENROLLED IN ANY SCHOOL	INSTITUTIONS FOR DELINQUENTS	INSTITUTIONS FOR NEGLECTED
30 hrs.	NA	NA	NA	NA

Describe briefly how eligible children (public, non-public, institution, out of school) will participate in this activity. (Include length of instructional period, average size of classes, number of periods per week, and methods of instruction used.)

The Rooms of 15 are primary and middle grade classrooms with a maximum enrollment of 15 pupils each. Eligible students are those who are retarded in the basic skills re of reading, language and arithmetic (as defined in Part 1A in the project applicatio and not eligible for classes for the mentally retarded, (IQ must be 80 or above) or emotionally disturbed. Students will attend classes on a full-time basis (6 hours a day). Instructional emphasis is placed on the basic skills with remediation in area of academic deficiencies. Teachers use a flexible curriculum designed to meet the unique needs of their pupils, and provide a variety of relevant, interesting and sti mulating instructional materials and learning experiences for the various ability levels of the pupils. Additional assistance is provided for pupils through supportiv services.

Degree of educational deprivation necessary for participation.

The minimum requirements will conform to the state standards for educational deprivation. In the upper primary and in the middle and upper grades, priority will be given to students with 10 months or more deprivation.

Objectives See attached.

Methods of Evaluation One group design using pre-test and/or post-test scores on the project group to compare observed performance with local, state, or national norm

APPENDIX C

APPENDIX C

Description

ace of activity (school facilities to be used)

Lincoln High School

5017 Washington Avenue

bers of hours per week children will participate in this activity

PUBLIC SCHOOL	NON-PUBLIC SCHOOL	NOT ENROLLED IN ANY SCHOOL	INSTITUTIONS FOR DELINQUENTS	INSTITUTIONS FOR NEGLECTED
30 hrs.	NA	NA	NA	NA

scribe briefly how eligible children (public, non-public, institution, out of school) will participate in this ject. (Include length of instructional period, average size of classes, number of periods per week, and ds of instruction used.)

This school provides a special instructional environment for socially maladjusted students suspended from Title I high schools because of behavior disruptive to other students' learning, poor school attendance and inadequate learning performances. Lincoln has a 6-hour day schedule designed to meet the academic and social needs of pupils through a flexible curriculum and individualized instruction. Classes are limited to 12 students each, and are homogeneous in regard to academic achievement of pupils. Curriculum includes academic, art, home economics, industrial arts, and business education courses. The work-study aspect of the program provides for part-time classes and part-time employment. Supplementary supportive services provide additional assistance for solving pupil problems.

gree of educational deprivation necessary for participation

Educational deprivation will be determined by a pupil's inability to continue his education in the regular school setting because of learning and adjustment problems.

ectives To reduce absenteeism by 20%. To show a significant improvement in student achievement following Lincoln as measured by statistical tests of difference. To increase the number of students referred to community services. To improve employer evaluations of students working as part of their school program from satisfactory to good.

hods of Evaluation One group design using pre-test and/or post-test scores on the project group to compare observed performance with local, state, or national norms; and descriptive statistics on students.